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PENGARAH JABATAN PERHUTANAN NEGERI SELANGOR DARUL EHSAN & ANOR v. SYARIKAT SEBATI SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ZAMANI A RAHIM JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: B-01(A)-72-03-2016]
7 DECEMBER 2016

C ***CONTRACT:*** *Agreement – Draft agreement – Logging concession – Whether parties must abide by stipulations in final draft formal agreement – Whether agreement duly executed by government bodies binding – Whether draft agreement and approved letter could become one contract – Whether sustainable in law – Plaintiff's failure to lead evidence on which agreement parties were conducting on day to day affairs – Whether fatal to plaintiff's case – Whether plaintiff entitled to* D *compensation – Whether requirements of ss. 2 & 3 of Government Contracts Act 1949 met*

TRADE & INDUSTRY: *Forestry – Logging concession – Agreement – Draft agreement – Whether parties must abide by stipulations in final draft formal agreement – Whether agreement duly executed by government bodies binding –* E *Whether draft agreement and approved letter can become one contract – Whether sustainable in law – Plaintiff's failure to lead evidence on which agreement parties were relying on to conduct day to day affairs – Whether fatal to plaintiff's case – Whether plaintiff entitled to compensation – Whether requirements of ss. 2 & 3 of Government Contracts Act 1949 met*

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The appellants ('defendants') appealed against the decision of the High Court Judge who had ruled that the defendants were bound by the draft agreement which had not been duly executed by the Government and/or Government bodies as binding on the defendants. The respondent ('plaintiff'), a private limited company in forestry activities, made applications to the defendants G for a long term sustainable management of concession. The object of the applications was to maintain the plaintiff's continuing involvement in the forestry and logging sectors principally in the State of Selangor. By an approval letter ('approval letter'), the first defendant informed that the plaintiff had been given a logging concession. In response to the letter, the H plaintiff wrote and sent a draft agreement to be executed by the plaintiff and the second defendant. There was, however, no response from the defendants. In the meantime, the plaintiff was permitted to do some logging activities. Subsequently, the first defendant sent a draft agreement. However, the plaintiff sent a revised draft agreement seeking for comments. The first I defendant did not respond to the revised draft agreement. The first defendant

then wrote to the plaintiff to apply for an alternative logging area. The plaintiff chose to treat the said letter as a termination and commenced the first action which was not successful. The Judicial Commissioner in the first action concluded that in essence, by conduct, the defendants were bound by the terms of the draft agreement, but that there was no repudiation of contract and hence the plaintiff was not entitled to damages without termination of the contract. The judge in the instant case, however, after taking the contract in its entirety, found that the defendants could terminate the approval but must abide by what was stipulated in the final draft formal agreement. Thus, it was held that the plaintiff was entitled to compensation. Hence, this appeal.

Held (allowing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) There were two documents which were said to be evidence of a contract. The only document where both parties agreed to be binding was the 'approved letter'. The plaintiff's assertion was that the termination must be pursuant to cl. M of the draft agreement. The defendants' assertion was that the termination ought to be based on the 'approval letter'. There was no evidence led by the plaintiff in the originating summons for this court to ascertain based on which agreement the parties were proceeding with the conduct of the business. This court was not bound by the grounds of decision of the first judgment though the decision of the court was relevant (Evidence Act 1950). The decision of the court was that the plaintiff's claim was premature and in consequence was dismissed with costs. Thus, the plaintiff's failure to lead evidence on which agreement the parties were conducting on day to day affairs was fatal to the plaintiff's case. (para 16)

(2) To say that the 'approved letter' as well as the draft agreement had become one contract was not sustainable in law. It was either the terms of the 'approval letter' or the terms of the draft agreement. Any construction otherwise by the courts would breach the rule as to the requirement of 'certainty of terms'. In addition, this court was not prepared to condone the proposition of the Judicial Commissioner in the first judgment that 'the defendants had acquiesced to those terms' when the requirements of ss. 2 and 3 of the Government Contracts Act 1949 have not been met. Hence, the order of the High Court was set aside. (para 16)

Bahasa Malaysia *Headnotes*

Perayu-perayu ('defendan-defendan') merayu terhadap keputusan Hakim Mahkamah Tinggi bahawa defendan-defendan terikat dengan deraf perjanjian yang belum lagi dikuatkuasakan oleh Kerajaan dan/atau badan-badan Kerajaan sebagai mengikat defendan-defendan. Responden ('plaintif'), sebuah syarikat sendirian berhad dalam aktiviti perhutanan, membuat permohonan

kepada defendan untuk pengurusan konsesi jangka panjang berkekalan. Tujuan permohonan adalah untuk mengekalkan penglibatan plaintif dalam sektor perhutanan dan pembalakan terutamanya di Negeri Selangor. Melalui surat kelulusan, ('surat kelulusan'), defendan pertama telah memaklumkan bahawa plaintif diberikan konsesi pembalakan. Sebagai respon surat tersebut, plaintif menghantar deraf perjanjian untuk dilaksanakan oleh plaintif dan defendan kedua. Walau bagaimanapun, tiada respon diberi oleh defendan-defendan. Pada masa yang sama, plaintif dibenarkan menjalankan aktiviti-aktiviti pembalakan. Seterusnya, defendan pertama menghantar deraf perjanjian. Plaintif pula menghantar deraf perjanjian yang disemak semula dan meminta komen. Defendan pertama tidak memberi apa-apa respon terhadap deraf yang disemak semula. Defendan pertama kemudiannya mengarah plaintif memohon kawasan pembalakan alternatif. Plaintif memilih untuk menganggap surat tersebut sebagai satu pembatalan dan memulakan tindakan pertama yang tidak berjaya. Pesuruhjaya Kehakiman dalam tindakan pertama menyimpulkan bahawa pada dasarnya, oleh kelakuan, defendan-defendan terikat dengan syarat-syarat deraf perjanjian, tetapi tidak terdapat penolakan kontrak dan oleh itu plaintif tidak berhak ke atas ganti rugi tanpa satu pembatalan kontrak. Hakim dalam kes ini, walau bagaimanapun, selepas mengambil kira kontrak secara sepenuhnya, mendapati bahawa defendan-defendan boleh membatalkan kelulusan tetapi mesti mematuhi apa yang ditetapkan dalam deraf akhir perjanjian rasmi. Dengan itu, diputuskan bahawa plaintif berhak mendapat ganti rugi. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Terdapat dua dokumen yang dikatakan sebagai bukti satu kontrak. Hanya satu dokumen yang dipersetujui oleh pihak-pihak terlibat sebagai terikat iaitu 'surat kelulusan'. Dakwaan plaintif adalah bahawa pembatalan harus menurut kl. M deraf perjanjian. Dakwaan defendan pula bahawa pembatalan harus berdasarkan 'surat dilulus'. Tiada keterangan diberikan oleh plaintif dalam saman pemula untuk mahkamah ini memastikan perjanjian yang mana satu dirujuk oleh pihak-pihak terlibat bagi menjalankan urusan mereka. Mahkamah ini tidak terikat dengan keputusan penghakiman pertama tetapi keputusan mahkamah adalah relevan (Akta Keterangan 1950). Keputusan mahkamah adalah tuntutan plaintif sememangnya pramatang dan oleh itu ditolak dengan kos. Dengan itu, kegagalan plaintif untuk membawa keterangan berkenaan perjanjian yang mana satu dirujuk oleh pihak-pihak bagi menangani urusan hari ke hari memudaratkan kes plaintif.

(2) Untuk menyatakan bahawa 'surat dilulus' serta deraf perjanjian telah menjadi satu kontrak tidak boleh dipertahankan dari segi undang-undang. Ia sama ada syarat-syarat 'surat kelulusan' atau syarat-syarat

deraf perjanjian. Apa-apa konstruksi sebaliknya oleh mahkamah akan melanggar peraturan keperluan 'kepastian istilah'. Tambahan, mahkamah ini tidak bersiap sedia untuk membiarkan dalil Pesuruhjaya Kehakiman dalam penghakiman pertama yang diikuti oleh hakim dalam kes ini bahawa 'defendan-defendan bersetuju dengan syarat-syarat itu' apabila ss. 2 dan 3 Akta Kontrak Kerajaan 1949 tidak dipenuhi. Oleh itu, perintah Mahkamah Tinggi diketepikan.

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bhikraj Jaipuria v. Union of India AIR 1962 SC 113 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(refd)***

KP Chowdhary v. State of Madhya Pradesh AIR 1967 SC 203 ***(refd)***

Re Hj Khalid Abdullah; Ex p Danaharta Urus Sdn Bhd [2008] 2 CLJ 326 HC ***(refd)***

Sundralingam v. Ramanathan Chettiar [1967] 1 LNS 173 FC ***(refd)***

Suwiri Sdn Bhd v. Government of the State of Sabah [2008] 1 CLJ 123 FC ***(refd)***

Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Hutan Negeri Selangor & Anor [2014] 1 LNS 537 HC ***(refd)***

Tan Lay Soon v. Kam Mah Theatre Sdn Bhd [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657 HC ***(refd)***

Legislation referred to:

Government Contracts Act 1949, ss. 2, 3

The Constitution of India [Ind], art. 299(1)

Other source(s) referred to:

HK Saharay, *The Constitution of India*, 2nd edn, p 635

Janabs Key To Civil Procedure, 5th edn, pp 20, 21

For the appellants - Norazimin Kassim; Assistant Legal Advisor

For the respondent - K Kirubakaran, R Ramanathan, Nadzarin Wok Nordin & Wong Jing En; M/s Nadzarin Kuok Puthucheary & Tan

[Editor's note: For the High Court judgment, please see Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan Negeri Selangor Darul Ehsan & Anor [2016] 1 LNS 407 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants/defendants appeal against the decision of the learned High Court Judge who had ruled that the appellants are bound by draft agreement which has not been duly executed by the Government and/or government bodies as binding on the appellant.

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[2] In the instant case, the learned trial judge had relied on a previous judgment (first judgment) of the High Court which was not able to give any relief to the respondent/plaintiff on the ground that the respondent's action was premature.

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[3] What is important to note in this case is that the plaintiff in this action has proceeded based on the originating summons notwithstanding that the plaintiff's argument was that the defendants by conduct were bound by the draft agreement. The plaintiff here relies on the previous suit where the High Court had found that the letter of offer ('approval letter') by which the plaintiff commenced logging activities and the subsequent draft agreement were binding on the defendants. However, the High Court said as the agreement was not terminated by the defendants, the plaintiff could not seek for damages.

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[4] On appeal to the Court of Appeal by the defendants, we are told that the appeal was dismissed and there were no grounds on what basis the appeal was dismissed. In consequence, we have to largely rely on the first judgment of the High Court, though we are not obliged to agree to the reasoning of the said court, more so when the learned High Court Judge in the first case had in essence, ruled that the Government and/or government bodies can by conduct be liable on the draft agreement. Support for the proposition is found in a number of cases. For example:

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(a) In *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211 it was stated that each court is bound by the decisions of the courts above it, but individual judges are not bound by each other decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinion of their brethren. Further, the court stated that within the past decade and even the last lustrum, judges in Malaya have on several occasions respectfully agreed to differ, as may be seen from the reports in The Malayan Law Journal.

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(b) In *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, the Federal Court stated that, 'the Federal Court and its forerunner, ie, the Supreme Court had never refused to depart from its own decision when it appeared right to do so. The effect or weight of a decision of a 'full court' and that of an ordinary coram is the same. When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision'.

I

(c) In *Re Hj Khalid Abdullah; Ex p Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326, the court had this to say:

> *Stare decisis* is nothing more than judge made law, which requires the decision of the apex court to be followed to ensure that there is certainty in the application of law to achieve substantive justice. This principle of *stare decisis* cannot tie the hands of individual judges of His Majesty in administering substantive justice when the decision of the apex court will perpetuate fraud or reward fraud or the decision *per se* can be said to be abhorrent to notions of justice and fair play or inconsistent with subsequent amendments to Act of Parliament or rules of procedure, etc. (See *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133, *Lam Kong Company Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 3 CLJ 769, and *CapitaI Insurance Bhd v. Asiah Abdul Manap & Anor* [2000] 4 CLJ 1 - Article [2001] MLJ 1: xlix). This is so because each and every judge has taken an oath of office individually and not collectively to protect the Constitution. When an apex court decision is fatally flawed and will cause substantive injustice, then the *stare decisis* principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of *stare decisis*, they were not focused on issues relating to appellate courts' decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply the principles of *stare decisis* to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of *stare decisis*. Support for my proposition can be found in various cases and writings. Some of them are as follows ... .

[5] It must be emphasised that, every judgment must be read as applicable to the particular facts pleaded and proved. The generality of expressions which may be found in the judgment are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. Expression of judges must be understood in relation to the subject matter before the court as well as related legal inclusive of procedural principles. (See *Tan Lay Soon v. Kam Mah Theatre Sdn Bhd* [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657; [1992] 2 MLJ 434; *Janabs Key To Civil Procedure*, 5th (edn) pp. 20 and 21).

Jurisprudence Relating To Government Contracts

[6] The jurisprudence relating to execution of Government contracts is anchored pursuant to Government Contracts Act 1949 (Revised 1973) Act 120 (GCA 1949). Essentially, it displaces the common law position as well as principles relating to contract. Some principles related to this case is that in our view, the Government and/or government bodies may not be liable on the basis of 'conduct' and/or implied contract and/or acquiescence, etc.;

to conclude that there was in fact a contract based on a draft agreement which has not been duly executed. There may be exceptions if the claim is based on *quantum meruit*, etc. The parties' submission here was not comprehensive notwithstanding that the appellants' main contention is that there is only one agreement and that is the 'approval letter' and the draft agreement is not valid and enforceable. The said GCA 1949, ss. 2 and 3 read as follows:

> 2. Contracts on behalf of the Government
>
> All contracts made in Malaysia on behalf of the Government shall, if reduced to writing, be made in the name of the Government of Malaysia and may be signed by a Minister or by any public officer duly authorised in writing by a Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorisation.
>
> 3. Contracts on behalf of a State Government
>
> (1) All contracts made in Malaysia on behalf of a State Government shall, if reduced to writing, be made in the name of the Government of that State, and may be signed by the Chief Minister of the State, or by any public officer duly authorised in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorisation.
>
> (2) In the application of this section to Sabah and Sarawak "Chief Minister" includes any State Minister.

[7] The Indian position is covered by art. 299 of the Indian Constitution. It must be noted that there is no similar provision in our Constitution. However, Government Contracts Act was already in place before independence. The said art. 299 of the Indian Constitution reads as follows:

> 299. Contracts. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

[8] In *Bhikraj Jaipuria v. Union of India* AIR 1962 SC 113, the Indian Supreme Court in dealing with art. 299(1) had this to say:

> it is clear from the words "expressed to be made" and "executed" that there must be a formal written contract... The provisions of Article 299(1) are mandatory in character and any contravention thereof nullifies the contract and makes it void. The provisions of Article 299(1) have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against the unauthorised contracts. The provisions are embodied in the constitution on the ground of public policy on the ground of protection of general public and these formalities cannot be waived or dispensed with.

In *KP Chowdhary v. State of Madhya Pradesh* AIR 1967 SC 203: (1966) 3 SCR 919 that: A

> In view of the provisions of Article 299(1) there is no scope for any implied contract. Thus no contract can be implied under this Article. if the contract between the Government and a person is not in compliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person. B

[9] The law on art. 299(1) has been summarised on the subject by the learned author HK Saharay in his book '*The Constitution of India*' (2nd edn) at p. 635 as follows:

> The law on the subject which emerges from various authorities is as follows: (a) A formal deed or document of contract is not necessary; (b) A contract can be inferred from correspondence; (c) A mere tender and acceptance is sufficient to constitute a valid contract; (d) The contract must be entered into by an authorised person. However, a contract entered into by an unauthorised person can be ratified by the Government particularly if it is for the benefit of the Government; (e) No particular mode in which authority is conferred has been prescribed by Art. 299(1). Normally such conferment is by a notification in the Official Gazette. But it can also be ad hoc on any person; (f) The sanction to the contract can be expressly or impliedly given and while inferring the sanction, the actions apart from the execution of the document can be considered; (g) A contract entered into without complying with the requirements of Art. 299(1) is void in the sense that it cannot be enforced by either party to the contract.

[10] In the instant case, the appellants in the submission had referred to GCA 1949. The respondent did not substantively reply to that part of the submission. Further, we also note that the learned Judicial Commissioner in the first judgment had not referred to the effect of GCA 1949 in his judgment.

[11] In our view, the draft agreement in law cannot be construed as a contract without execution as well as evidence that it has been executed as per the requirement of GCA 1949. (See *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123). Any breach will be a nullity *ab initio* whether or not the parties have not raised it in the pleadings, arguments and/or memorandum of appeal. (See *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393; *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLRA 289).

[12] Further, we take the view that the principles of *res judicata* on the facts are not applicable. The plaintiff's reliance on the principles of *re judicata* here is misconceived, taking into consideration the provisions of GCA 1949. Support for the proposition is found in a number of cases. For example, in *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 CA, Gopal Sri Ram JCA (as he then was) had this to say:

Now, there is a dimension to the doctrine of *res judicata* that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss Stiftung v. Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p. 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind*. (emphasis added.)

In *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. **One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result**, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (emphasis added.)

In a later passage, I find Lord Keith saying:

> Estoppel *per rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.

These views were very recently reaffirmed by the House of Lords in *Johnson v. Gore Wood & Co* (2000) (Unreported, speeches published on 14 December 2000). See in particular the speech of Lord Bingham of Cornhill, at pp. 8-10 of the transcript.

On the authorities discussed thus far, the principle comes to this. Whether *res judicata* in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

Adopting the approach that commends itself to me, I find that the justice of the present instance demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from reagitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings. There are three reasons that move me in this direction.

Brief Facts

[13] The facts of this case had been well articulated in the first judgment. (See *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Hutan Negeri Selangor & Anor* [2014] 1 LNS 537). We do not wish to set out the full facts, save as to the followings:

(a) By the 'approval letter', the first defendant informed that the plaintiff had been given a logging concession. The said letter reads as follows:

Ruj. Kami: PHN.Sel.05/10/1/39 (1)

Tarikh: 30hb September, 1999

Pengurus

Syarikat Sebati Sdn. Bhd.,
Lot 3005, Jalan Ulu Yam Baru
44300 Batang Kali
Hulu Selangor.

Tuan,

Permohonan Peruntukan Kawasan Hutan Untuk Perjanjian Jangka Panjang Oleh Sebati Sdn. Bhd. Bagi Pengurusan Hutan Secara Berkekalan.

Dengan hormatnya merujuk kepada perkara di atas sukacita dimaklumkan bahwa Majlis Mesyuarat Kerajaan Negeri Selangor yang bersidang pada 18 Ogos, 1999 telah meluluskan permohonan tuan bagi kawasan hutan perjanjian jangka panjang sejumlah lebih kurang 9,000 hektar di Hutan-hutan Simpanan Gading dan Bukit Belata seperti di pelan dan lampiran-lampiran berkembar dengan syarat-syarat berikut:

(a) Satu Perjanjian hendaklah ditandatangani di antara Kerajaan Negeri dan pihak Syarikat Sebati Sdn. Bhd. dalam masa 6 bulan kelulusan diberikan;

(b) Tempoh perjanjian adalah selama 30 tahun mulai 1999 sehingga 2028.

(c) Catuan Tebangan Tahunan ialah seluas lebih kurang 300 hektar setahun.

(d) Pihak Syarikat hendaklah menyediakan satu Rancangan Pengurusan Hutan untuk setiap sepuluh tahun dan juga bagi tempoh perjanjian bagi kawasan tersebut.

A (e) Satu Rancangan Pengusahasilan Hutan perlu disedia dan diluluskan oleh Pengarah Perhutanan Negeri sebelum sesuatu kawasan catuan dibuka.

(f) Syarikat juga hendaklah melaksanakan kerja-kerja pemulihan dan pembangunan hutan di kawasan tersebut dan satu rancangan
B pembangunan hendaklah disediakan. Satu laporan kemajuan tahunan mengenai aktiviti-aktiviti yang dijalankan hendaklah dikemukakan kepada Pengarah Perhutanan Negeri untuk tujuan pemantauan.

(g) Semua operasi perhutanan syarikat hendaklah sentiasa tertakluk
C kepada arahan-arahan semasa serta enakmen-enakmen perhutanan yang berkuatkuasa.

(h) Caj-caj yang dikenakan adalah pada kadar yang berkuatkuasa.

(i) Pengarah Perhutanan Negeri berhak mengenakan apa-apa syarat selaras dengan keperluan Enakmen-enakmen dan Kaedah-kaedah
D yang berkuasa.

(j) **Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan bila-bila masa apabila diperlukan**. (emphasis added).

Sekian, dimaklumkan.

E BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,

t/t

(RAZALI BIN UJANG)
F b.p. PENGARAH PERHUTANAN NEGERI,
SELANGOR DARUL EHSAN.

s.k.:

Pegawai Hutan Daerah,
Hulu Selangor
G 48000 Rawang.

(b) In response to the letter, the plaintiff by letter dated 16 November 1999 wrote and sent a draft agreement to be executed by the plaintiff and the second defendant. There was no response from the defendants.

H (c) In the meantime, the plaintiff was permitted to do some logging activities.

(d) Again, the plaintiff, by letter dated 5 September 2001 wrote and sent a draft agreement. There was no response from the defendants.

I (e) The first defendant by a letter dated 10 May 2003 sent a draft agreement. However, the plaintiff sent a revised draft agreement seeking for comment.

What is essential to note from the facts above is that the plaintiff by a letter dated 7 July 2003 (which was not exhibited in the OS but referred to by the Judicial Commissioner), did not accept the draft agreement *in toto*. The said letter is mentioned by the Judicial Commissioner as follows:

> 11. After persistent follow ups by the Plaintiff, the First Defendant finally by a letter dated 10 May 2003 wrote to the Plaintiff proposing a standard format of the formal agreement to be executed between the Plaintiff and the Second Defendant. Accordingly, the Plaintiff principally adopted the format and by letter dated 7 July 2003 wrote to the First Defendant enclosing the revised draft formal agreement ("Draft Formal Agreement") for review and comment by the First Defendant.

(f) The first defendant did not respond to the revised draft.

(g) Subsequently, the first defendant wrote to the plaintiff to apply for alternative logging area. The plaintiff chose to treat the said letter as termination and commenced the first action which was not successful.

(h) The learned Judicial Commissioner in the first action considered two termination clauses and came to the conclusion that:

(i) The first termination clause comes from letter of approval dated 30 September 1999 which reads as follows:

> (j) Kerajaan Negeri juga berhak menarik balik semua atau sebahagian kawasan - bila-bila masa apabila diperlukan.

(ii) the second termination clause comes from the draft agreement, which reads as follows:

> M TERMINATION ON NATIONAL INTEREST
>
> (a) Notwithstanding any provision of this Agreement, the Government may terminate this Agreement by giving not less than sixty (60) days notice to that effect to the Company (without any obligation to give reason thereof) if it considers that such termination is necessary for national interest, in the interest of national security or for the purposes of Government policy or public policy.
>
> (b) Upon such termination, the Company shall be entitled to compensation which shall be determined by an independent auditor appointed by the Government after due consultation with the Company.
>
> For the purposes of this Clause, what constitutes "national interest", "interest of national security", "the Government policy" and "public policy" shall be solely made and determined by the Government and such determination shall for all intent and purposes be final and conclusive and shall not be open to challenge whatsoever.

(iii) concluded that in essence by conduct, the defendants were bound by the terms of the draft agreement. That part of the judgment reads as follows:

> 28. Accordingly, I find and hold that there is a valid and binding logging contract between the parties in the circumstances. The terms of the logging contract comprise those in the Approval Letter as well as the Draft Formal Agreement following the Court of Appeal case of *Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Anor* [2013] 7 CLJ 713 since the latter was not contested by the Defendants in any way. In other words, the Defendants had acquiesced to those terms.

(iv) also concluded that there was no repudiation of contract and hence the plaintiff was not entitled to damages without termination of the contract. That part of the judgment reads as follows:

> 40. Thus and notwithstanding that I have found a binding contract between the parties, there was however no repudiation of the contract by the Defendant to justify the Plaintiffs claim for compensation. Accordingly I hereby order that the Plaintiff's claim as pleaded be dismissed with costs. There is also no necessity to proceed further with the next stage of the trial on assessment of damages.

[14] The learned judge in the instant case relied totally on the first judgment of the Judicial Commissioner and in essence held that upon termination of the contract in breach of cl. M stated above, the plaintiff is entitled to judgment. The learned judge's conclusion read as follows:

> 22. Although the letter of approval itself under which the Defendants terminated the contract does not specify a circumstance under which the approval can be withdrawn, the final Formal Draft Agreement specifies that the approval of logging can be terminated for purposes of national interest, in the interest of national security or public policy. Taking the contract in entirety it therefore follows that the Defendants can terminate the approval but must abide by what is stipulated in the final Draft Formal Agreement.
>
> 23. On termination it is further stipulated in the final Draft Formal Agreement that the Plaintiff is entitled to compensation as assessed by an independent auditor. This is what the Plaintiff is seeking in this case. In abiding by the terms of the agreement between the parties I had no qualms of allowing the Plaintiff's application.
>
> 24. In the upshot the Plaintiffs application was allowed with a cost of RM5,000 against the Defendants and directed that an independent Valuer to assess the compensation due to the Plaintiff be appointed within 30 days of the court order.

[15] The memorandum of appeal of the defendants read as follows:

(i) Yang Arif Hakim yang terpelajar telah tersilap dari segi undang-undang dan fakta apabila memutuskan bahawa Defendan-Defendan perlu mengikut terma-terma di dalam "Final Draft Formal Agreement" sekiranya penamatan perjanjian dibuat memandangkan surat kelulusan ("Approval Letter") tidak menyatakan dalam keadaan bagaimana penamatan perjanjian perlu dibuat;

(ii) Yang Arif Hakim yang terpelajar telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan bahawa terdapat dua terma penamatan perjanjian diantara Plaintif dan Defendan-Defendan di dalam kes ini dan dua terma penamatan tersebut adalah berbeza di antara satu sama lain;

(iii) Yang Arif Hakim yang terpelajar telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa kedua-dua surat kelulusan dan "Final Draft Formal Agreement" perlu dibaca secara bersama-sama berkenaan dengan terma penamatan kontrak.

[16] We have read the appeal records and submissions of the parties in detail. After giving much consideration to the submission of the plaintiff, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) In the instant case, there are two documents which are said to be evidence of a contract. The only document where both parties agreed to be binding is the 'approval letter'. The plaintiff's assertion is that the termination must be pursuant to clause M of the draft agreement. The defendants' assertion is that the termination ought to be based on the 'approval letter'. There was no evidence led by the plaintiff in the originating summons for this court to ascertain based on which agreement the parties were proceeding with the conduct of the business. This court is not bound by the grounds of decision of the first judgment, though the decision of the court is relevant. (See EA 1950) The decision of the court as we had said earlier was that the plaintiff's claim was premature and in consequence was dismissed with costs. In our view, the plaintiff's failure to lead evidence on which agreement the parties were conducting on day to day affairs is fatal to the plaintiff's case.

(b) To say that the 'approval letter' as well as the draft agreement had become one contract is not sustainable in law. It is either the terms of the 'approval letter' or the terms of the draft agreement. Any construction otherwise by the courts will breach the rule as to the requirement of 'certainty of terms'. (See *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754; *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1; [1994] 1 MLJ 108).

A (c) In addition, we are not prepared to condone the proposition of the learned Judicial Commissioner in the first judgment which was followed by the learned judge in the instant case that 'the defendants had acquiesced to those terms' when ss. 2 and 3 of GCA 1949 requirements have not been met.

B **[17]** For reasons stated above, the appeal is allowed with costs of RM15,000 for here and below, subject to allocatur. The order of the High Court is set aside. Deposit is to be refunded.

We hereby order so.

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